Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

NO. 85-17

JOEL A VERNON, SR., *PETITIONER*

- VERSUS -

STATE OF LOUISIANA
THROUGH ROSS MAGGIO, WARDEN
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

WILLIAM EDWARD TILLEY
DISTRICT ATTORNEY
THIRTIETH JUDICIAL DISTRICT
PARISH OF VERNON
P.O. BOX 1188
LEESVILLE, LOUISIANA 71446
TELEPHONE NO. (318) 239-2008

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I. Whether or not Petitioner, who was convicted of second degree "felony-murder" was given adequate notice of the crime for which he was convicted by an indictment which charged first degree "specific intent" murder?

II. Whether or not the jury, when considering the evidence in the light most favorable to the prosecution, could have found the essential elements of aggravated kidnapping beyond a reasonable doubt?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	2 - 4
Argument	4 - 14
Conclusion	14
Appendix	A/1 - A/17

TABLE OF AUTHORITIES

Cases **Pages**

State v. Vernon, 385 So 2d 200 (La. 1980) 1, 2

United States v. Frady, 102 S. Ct. 1584 at 1593 5

Henderson v. Kibble, 97 S Ct. 1739 5

Alex Elaire, Petitioner v. Frank C. Blackburn, Warden, No. 82-6254 (U.S. S. Ct. 1982) 5

Jackson v. Virginia, 443 U.S. 309 ..... 7, 10, 11, 14

Watson v. Jato, 558 F. 2d 330 (6th Cir. 1977) 7

State v. Booker, 385, So. 2d 1186 (1980) 7

State v. Sterling, 407 So. 2d 1190 9

State ex rel Elaire, 424, So. 2d 246 9

State v. Procell, 365 so. 2d 484 (La. 1978) 14

STATUTES

Louisiana Revised Statute Annotated § 14:30 ..... 1, 3, 4

Louisiana Revised Statute Annotated § 14:30.1 ... 1,5,11,14

Louisiana Code of Criminal Procedure, Article 814 .. 1, 5

Louisiana Code of Criminal Procedure, Article 465 6

Louisiana Revised Statute Annotated § 14:44 ..... 1, 11

OPINIONS BELOW

1. State of Louisiana v. Joel A. Vernon, 385 So. 2d 200 (La. 1980)

2. Vernon v. Maggio, No. 83-2221 (W.D. La. May 23, 1984) modified June 5, 1984.

3. Vernon v. Maggio, No. 84-4407 (5th Cir. December 5, 1984) per curiam, appeal denied, (February 20, 1985) suggestion for rehearing en blanc denied.

JURISDICTION

Petitioner avers that jurisdiction to review the judgment of the United States Fifth Circuit Court of Appeals in this case, dated December 5, 1984, rehearing denied February 20, 1985 and entered that same date is conferred upon this Honorable Court by 28 U.S.C. Section 1254 (I).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional and statutory provisions which the case involves are set forth in the Appendix, p, A/16 - A/17:

1. United States Constitution, Amendment VI.
2. United States Constitution, Amendment XIV, Section I.
3. Louisiana Revised Statutes Annotated, Section 14:30.
4. Louisiana Revised Statutes Annotated, Section 14:30.I
5. Louisiana Code of Criminal Procedure Annotated, Article 814.
6. Louisiana Code of Criminal Procedure Annotated, Article 465.
7. Louisiana Revised Statutes Annotated, Section 14:44

STATEMENT OF THE CASE

The Louisiana Supreme Court stated the facts of this case in State v. Vernon, 385 So 2d 200 (La. 1980) as follows:

"FACTS

Vernon was the owner of the Cave Bar in Leesville, Louisiana. On Halloween night, 1978, he, James Regallis and Timothy Bray were in the back room of the bar with Michael Melcher. Melcher was pressed to repay some debts. A gun was pointed at him, and there was a minor fracas in which Melcher received a small cut on the head.

Vernon, Regallis and Bray then ordered Melcher into Vernon's stationwagon and took him to the Vernon Parish sanitary landfill.

At the landfill, Vernon hit Melcher first, striking him in the stomach with a stick one and a half to two feet long and about an inch in diameter. Melcher's jacket was pulled down to immobilize his arms and the three men took turns kicking and beating him with the stick and a club almost six feet long and two inches in diameter. There was testimony that the men played baseball with Melcher: Vernon umpired, Regallis pretended to pitch and Bray swung the club, hitting Melcher. They also engaged in Russian roulette, Regallis and Vernon each firing a shot about a foot above Melcher's head.

Melcher was left lying on his back, rolling his head from side to side and moaning. The other three returned to the Cave Bar.

A short time later, Bray, Regallis and Dale Slama went back to the landfill in Vernon's car. Melcher had pulled off his belt and thrown it aside and had completely unbuttoned his shirt. He felt cold and didn't appear to be breathing. Slama removed Melcher's money and identification from his pockets and, with Bray's help, moved the victim deeper into the woods. Regallis set fire to the area of the beating to conceal blood, and the three men returned to the Cave Bar.

On November 2, 1978, Melcher's charred and beaten body was discovered by hunters at the landfill site."

On Januray 29, 1979, Joel A. Vernon was indicted for first degree murder of Michael E. Melcher in violation of R. S. 14:30, which murder occurred on October 31, 1978. Prior to trial, he withdrew his former plea of not guilty and entered pleas of not guilty and not guilty by reason of insanity. His trial commenced and on April 13, 1979, he was found guilty of second degree murder.

On November 29, 1979, defendant filed a motion for new trial alleging newly discovered evidence. On December 16, 1980, and evidentiary hearing was held on the motion and the motion was denied.

The Louisiana Supreme Court affirmed the conviction (385 So. 2d 200) on May 19, 1980. Defendant filed an application for rehearing with the Louisiana Supreme Court and the defendant's application was denied on July 7, 1980.

Defendant filed an application for supervisory and remedial writs with the Louisiana Supreme Court; on March 27, 1981, the Louisiana Supreme Court denied the writs under Docket Number 81-K-0457.

On August 17, 1982, defendant filed an application for writ of habeas corpus in the 30th Judicial District Court; on November 17, 1982, an evidentiary hearing was held on the application for writ of habeas corpus which the trial court considered to be an application for post-conviction relief. The trial court denied the application.

On Januray 14, 1983, defendant filed an application for supervisory writs with the Louisiana Supreme Court. The defendant's application was denied on March 4, 1983.

Defendant filed an application for writ of habeas corpus with the United States District Court, Western District of Louisiana, Lake Charles Division, pursuant to 28 U.S.C. Section 2254. On March 20, 1984, the United States District Court granted the writ of habeas corpus. Apparently the memorandum was written by the United States Magistrate and adopted by the ruling of the court.

The next day, March 21, 1984, the United States District Court issued a minute entry which, in effect, invited the State to apply for a rehearing. A rehearing was granted over defendant's objection.

On May 23, 1984, the United States District Court reversed itself and dismissed the case.

Notice of appeal was filed and on December 5, 1984, the United States Court of Appeals, Fifth Circuit, issued a per curiam affirming the order of the district trial court and adopting the reasons stated in its memoranda dated May 23, 1984 and June 5, 1984.

On February 20, 1985, the United States Court of Appeals, Fifth Circuit, denied an Application for Rehearing En Banc.

Defendant now petitions this Honorable Court, Supreme Court of the United States, for Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I

Question: Whether or not Petitioner, who was convicted of second degree "felony-murder" was given adequate notice of the crime for which he was convicted by an indictment which charged first degree "specific intent" murder?

Defendant alleges that his conviction of second degee murder under a first degree murder indictment violated ths sixth and fourteenth amendments because the indictment failed to give adequate notice of the crime for which he was convicted.

Louisiana Revised Statute 14:30 defines First Degree Murder, as follows:

> "First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. . ."

Defendant was indicted for having "committed first

degree murder of Michael E. Melcher in violation of R. S. 14:30 (a felony)".

After trial by jury defendant was convicted of second degree murder which was a proper responsive verdict under applicable Louisiana procedural law.

Louisiana Revised Statute 14:30.1 defines Second Degree Murder, as follows:

> "Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, and armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm. . ."

Louisiana Code of Criminal Procedure Article 814 defined the appropriate responsive verdicts to first degree murder. Petitioner's jury was instructed that one of the following verdicts could be returned, to-wit:

1. Guilty as charged;
2. Guilty of second degree murder;
3. Guilty of manslaughter;
4. Not guilty;
5. Not guilty and not guilty by reason of insanity.

Defendant failed to object to the jury instructions regarding the responsive verdict of second degree murder. The State of Louisiana contends that the defendant's failure to object did not significantly prejudice him so as to violate the fundamental requirements of due process. This Honorable Court in the decision of United States v. Frady, 102 S. Ct. 1584 at 1593, citing Henderson v. Kibble, 97 S Ct. 1739, stated:

> "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitu-

tional validity of a State Court's judgment is even greater than the showing required to establish plain error on direct appeal."

The same or similar issue was raised with this Honorable Court in No. 82-6254 Alex Elaire, Petitioner v. Frank C. Blackburn, Warden on a Petition for Writ of Certiorari to the Supreme Court of Louisiana. In that case this Honorable Court denied defendant's petition on May 31, 1983.

It should be further noted that Louisiana Code of Criminal Procedure Article 465 specifically authorizes "short form" indictment forms for first and second degree murder. It reads in pertinent parts, as follows:

"Art. 465 Specific indictment forms

A. The following forms of charging offenses may be used, but any other forms authorized by this title may also be used:. . . . . .

31. First Degree Murder-A.B. committed first degree murder of C.D.
32. Second Degree Murder-A.B. committed second degree murder of C.D.

The form of notice authorized by short form indictment is the same for both first degree murder and second degree murder. Had defendant been indicted for second degree murder would he now be arguing that the "indictment" failed to adequately notify him of the charges against him because the indictment did not enumerate which felony was involved in the murder?

The State of Louisiana, as did the United States Court of Appeals, Fifth Circuit, adopts the well written opinion of the United States District Judge Edwin F. Hunter, Jr., who, in denying defendant's application for writ of habeas corpus stated in pertinent parts the following. (See petitioner's Appendix Exhibit A/6-A/24):

". . . . The principal issue on the alleged "due process" violation is whether Vernon was validly convicted of second degree murder under the pertinent statutes which at the time of the offense defined second degree murder

only as an unintentional killing committed in the course of certain enumerated felonies. Vernon presents alternative arguments in support of his contention:

(a) Petitioner's conviction of second degree murder violated the Sixth and Fourteenth Amendments, since the indictment, which charged petitioner with first degree "specific intent murder," failed to give adequate notice of the crime for which he was convicted.

(b) Petitioner's conviction of second degree "felony murder" violates the rule of Jackson v. Virginia, 443 U.S. 309, since no rational trier of fact could have found the essential elements of any one of the felonies enumerated in Louisiana's second degree murder statute.

(a) **LACK OF NOTICE**

Vernon raises a constitutional issue by asserting that he was convicted on a charge not stated in the indictment. The constitutional right is basic:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge. . . are among the constitutional rights of every accused. . ."

In Watson v. Jato, 558 F. 2d 330 (6th Cir. 1977), the court held that where a criminal defendant was forced to defend against felony-murder although charged with deliberate and premeditated first degree murder, the resulting conviction was a denial of due process under the Fourteenth Amendment. However, in that case Ohio law made it clear that premeditated and felony murder were two separate offenses. Id. at 334-335. Under Louisiana law (applicable on the date of the crime), second degree (felony murder) was a legislatively responsive verdict to a charge of first degree murder. See La. C. Cr. P. Article 814.

Petitioner relies heavily on the Louisiana Supreme Court case of State v. Booker, 385, So. 2d 1186 (1980), citing

this most helpful language from Judge Dennis' opinion on re-hearing:

> "It is a violation of due process either to send an accused to prison following conviction of a charge on which he was never tried or to convict him upon a charge that was never made."

If petitioner's contention as to "notice" is sustained it would be applicable to all second degree murder convictions returned in response to first degree murder indictments during this time span.

Booker involved an attempted first degree murder indictment to which the jury responded with an attempted second degree murder verdict. Judge Blanche and Watson categorically disagreed with that part of the opinion which held that defendant had no notice of the crime:

> "(B)ecause as a matter of law it was a responsive verdict to the crime of which he had been charged." ID. 1193

Judge Marcus also disagreed:

> "I would not reverse the conviction and sentence for attempted second degree murder because it was a responsive verdict to the crime charged." Id. 1193

Justices Dixon and Lemmon concurred in reversal because:

> "Attempt requires that the offender act with specific intent. R. S. 1427. In a logical analysis one cannot specifically intend (attempt) to do something that one does not intend to do. One therefore cannot attempt to kill a human being in the course of perpetrating another crime without intending to kill the victim. In other words there can be no such crime as attempted felony murder." Id. 1193

Here we are not addressing an "attempt conviction" and the foregoing quotations negate an interpretation of Booker as authority for petitioner's lack of notice argu-

ment.

Booker was represented by a competent attorney who specializes in criminal defense work. This same attorney represented Vernon in his motion for a new trial. No effort was made to draw an analogy between the two. Subsequent Louisiana decisions citing Booker are interesting, State v. Sterling, 407 So. 2d 1190, had this to say:

> "Here as in Booker there was no proof of an underlying felony to support a conviction of second degree murder." Id. 1191

In State ex rel Elaire, 424, So. 2d 246, the Supreme Court of Louisiana certainly questioned the continuing vitality of Booker. There, they affirmed the "attempted second degree murder" conviction. In the course of that decision, we find this language:

> "The theory expressed in Justice Marcus' dissent in Booker and earlier in the Peterson case (that a jury may return a legislatively approved responsive verdict, whether or not that verdict is supported by the evidence, as long as the evidence is sufficient to sustain a conviction of the charged offense) recognizes the legitimacy of a 'compromise' verdict which does not 'fit' the evidence, but which (for whatever reason) the jurors deemed to be fair. This view, which accords the jury the prerogative to return a verdict of a lesser offense which is not supported by the evidence, comports with the spirit of the responsive verdict article, since one major purpose of that article was to relieve the trial judge from having to review the evidence actually presented at the trial in order to decide which responsive verdicts should be given to the jury. See La. C. Cr. P. Art. 814 Official Revision Comment (a)."

. . .

> "It would be unfair to permit the defendant to have the advantage of the possibility that a lesser 'compromise' verdict will be returned (as opposed to being convicted of the offense charged)

and then to raise the complaint for the first time on appeal, that the evidence did not support the responsive verdict to which he failed to object. Therefore, at least when the defendant fails to interpose a timely objection to a legislatively responsive verdict, this court will not reverse the conviction if the jury returns such a verdict, whether or not that verdict is supported by the evidence, as long as the evidence is sufficient to support the offense charged."

. . .

"The jury's verdict was apparently a compromise decision to find defendant guilty of something less than attempted first degree murder. The jury chose the next highest offense from the list of responsive verdicts. While the evidence did not support a conviction of the offense chosen by the jury, the evidence would have supported a conviction of the charged offense. Because defendant did not object (because of an oversight or as a matter of trial strategy) to the instruction, which in effect informed the jury that it could properly return a verdict of attempted second degree murder, defendant cannot later complain that the evidence (which would have supported a conviction of the offense charged) did not support the lesser verdict chosen by the jury." Id. 252

The evidence here would clearly have supported a conviction of first degree murder, and under the rationale of Elaire, the conviction would stand. We cannot go "all the way" with Elaire, and would agree with the dissent that the second degree murder conviction should not have been permitted to stand, absent sufficient proof within the meaning of Jackson v. Virginia, 443 U. S. 309. We will reach that later.

We return now to the "notice" issue. A fair evaluation of the record requires a rejection of the "lack of notice" contention. Felony (second degree) murder was a legislatively responsive verdict. Vernon and his counsel had fully and timely notice of the charges against him. They

knew that the felony murder theory would be submitted. They did not object to either the charge or the verdict forms that were given to the jury. No one was taken by surprise. Extensive and strong arguments were presented to the jury to avoid both a first degree verdict and a second degree conviction. Counsel may very well have been wise to let the case go to the jury with an option to return a verdict reducing the grade of offense. Stated concretely, we hold that the indictment, together with Louisiana's responsive verdict statute, sufficiently apprised Vernon of what he must be prepared to meet. He knew it and endeavored to meet the issues both as to first degree and second degree murder. . ."

ARGUMENT
II

Question: Whether or not the jury, when considering the evidence in the light most favorable to the prosecution, could have found the essential elements of aggravated kidnapping beyond a reasonable doubt?

A rational trier of fact could reasonably have found proof of petitioner's guilt beyond a reasonable doubt. Jackson v. Virginia, 443, U.S. 307, 324. The evidence was sufficient to sustain a guilty verdict of either first degree murder or second degree murder.

Louisiana Revised Statute 14:30.1 defines Second Degree Murder as:

> "Second degree murder is the killing of a human being: When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm."

Louisiana Revised Statute 14:44 defines aggravated kidnapping as:

> "Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the

victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:

(1) The forcible seizing and carrying of any person from one place to another; or

(2) The enticing or persuading of any person to go from one place to another; or

(3) The imprisoning or forcible secreting of any person.

Defendant would rather have one ignore his own testimony at his trial and the testimony that was adduced from his co-defendant, Timothy Bray, that clearly and unequivocally made defendant a principal to the beating of Michael Melcher which left Michael Melcher near unconsciousness and death lying on his back, rolling his head from side to side, moaning and groaning.

The State submits and argues that the evidence is clear and convincing beyond a reasonable doubt that either the crime of first degree murder or second degree murder was committed by Bray, Vernon and Regallis when they left the sanitary landfill on the first occasion. All three defendants either were found guilty or plead guilty as principals for the death of Michael Melcher. Consider the following facts and evidence that was proven at the trial of Vernon. All of these acts were committed prior to the time that Vernon, Bray and Ragallis left Melcher near death at the sanitary landfill. (Transcript of Vernon's testimony upon cross-examination, Pages 812 through 895; also testimony of Timothy Bray, Pages 463 through 600.)

1. Vernon, Bray and Regallis took Michael Melcher to the sanitary landfill for the purpose of collecting $390.00 owed to Regallis and Vernon by Melcher (TR. Page 814);
2. Vernon was armed with a gun at the Cave Bar and at the sanitary landfill. (Tr. Page 879-880);

3. Bray testified that his intention in accompanying the victim to the landfill was to. . .beat Melcher in the hope that he might pay me my money and that was the discussion when everyone had left the Cave Bar (Tr. Page 491);
4. Melcher was hit in the ribs for the purpose of breaking his ribs (Tr. Page 864);
5. Melcher was hit in the knees for the purpose of breaking his kneecaps (Tr. Page 84);
6. Vernon thought Melcher was dead (Tr. Page 864-865);
7. Beating of Melcher lasted approximately thirty minutes (Tr. Page 866);
8. Melcher was moaning and groaning and turning his head when defendants left him (Tr. Page 868);
9. Defendants put Melcher in Vernon's stationwagon so they could take him to the sanitary landfill (Tr. page 871);
10. Vernon was mad at Melcher because Melcher owed him money (Tr. Page 876);
11. Vernon acknowledged he had previously told the police in State Exhibit No. 19 that a fight between Melcher and another person at Vernon's Cave Bar was stopped because "We wanted to stop him because we wanted to whip his ass ourselves" (Tr. Page 877);
12. Vernon struck the first blow to Melcher (Tr. Page 878);
13. Vernon admitted being involved in the beating of Michael Melcher (Tr. Page 858);
14. Vernon fired two shots near Melcher's feet and head (Tr. Page 881-882);
15. Regallis hit Melcher in the back of the head with a 9mm pistol and Melcher passed out after Regallis said he was trying to knock him out (Tr. Page 883-885);
16. Melcher was stomped, kicked and beaten with logs (Tr. Page 885-886);
17. Melcher begged for mercy and promised to pay defendants the money he owed (Tr. Page 887);
18. Defendants planned on leaving Melcher unconscious (Tr. Page 888);

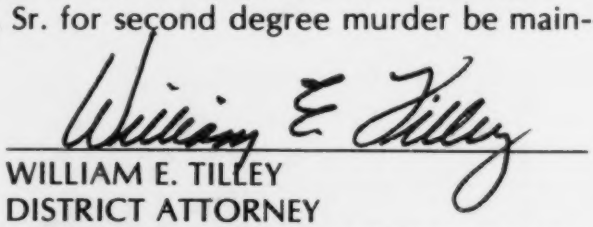
19. Melcher was hit over the head with a log (Tr. Page 889);

The evidence conclusively established that all defendants possessed the requisite specific intent to kill or to inflict great bodily harm upon Michael Melcher during the beating they inflicted upon him at the sanitary landfill. The evidence also established that defendants were engaged in the perpetration of "aggravated kidnapping" an enumerated felony under La. R. S. 14:30.1. Defendants, armed with a gun, "forcibly seized and carried the victim," Michael Melcher, from the Cave Bar to the sanitary landfill. Defendants certainly "enticed or persuaded" Michael Melcher to go from the Cave Bar to the sanitary landfill. The evidence reveals that they possessed the intent to force the victim to give up something of present or prospective value before they intended to abandon their possession of him.

The State of Louisiana submits that a rational trier of fact could readily have found the petitioner guilty beyond a reasonable doubt of second degree murder and that petitioner and his co-defendants were engaged in the perpetration of aggravated kidnapping. State v. Procell, 365 So. 2d 484 (La. 1978), Jackson v. Virginia, 443 U.S. 309.

CONCLUSION

The State of Louisiana respectfully suggests that the opinions of the Louisiana Supreme Court, United States District Court, Western District of Louisiana, and United State Court of Appeals, Fifth Circuit, should be affirmed and the petitioner's writ denied, and the conviction of Joel A. Vernon, Sr. for second degree murder be maintained.



WILLIAM E. TILLEY
DISTRICT ATTORNEY
THIRTIETH JUDICIAL DISTRICT COURT
PARISH OF VERNON
STATE OF LOUISIANA
P.O. BOX 1188
LEESVILLE, LOUISIANA 71446

A-P-P-E-N-D-I-X

APPENDIX INDEX

Decision from the Supreme Court of the State of Louisiana, State v. Vernon, 385 So. 2d 200 (La. 1980) ..... A/3 - A/15

Supplemental Appendix ..... A/16 - A/17

STATE of Louisiana

v.

Joel A. VERNON

No. 66186

Supreme Court of Louisiana

May 19, 1980

Rehearing Denied July 7, 1980.

Defendant was charged by grand jury indictment with first-degree murder and was convicted on a jury verdict before the Thirteenth Judicial District Court, Parish of Vernon, James C. Terrell, J., of second-degree murder, and he appealed from judgment and sentence. The Supreme Court, Watson, J., held that: (1) State met its burden to show that defendant's statement was free and voluntary; (2) photographs of victim's body were so gruesome as to inflame the jury against defendant; (3) introduction of detective's statement that defendant had been arrested on a charge of carrying a concealed weapon was not reversible error; (4) trial court's admonition to the jury to disregard question as to whether defendant testified at codefendant's trial was sufficient to assure defendant a fair trial; and (5) defendant did not show that mother's testimony as to defendant's religious background would create prejudice in the mind of the jury.

Affirmed.

Dennis, J., dissented with reasons and would grant a rehearing.

1. Criminal Law — 412.2(5)

High standards of proof for waiver of constitutional rights apply to in-custody interrogation.

2. Criminal Law — 414

When statement is taken without presence of an attorney, there is heavy burden on state to demonstrate that accused knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

3. Criminal Law — 412.1(1), 517.1(2)

Before confession or inculpatory statement may be introduced into evidence, state must prove affirmatively and beyond a reasonable doubt that the statement was free and voluntary and not made under influence of fear, duress, menaces, threats, inducements, or promises. LSA-Const. Art. 1,§ 13; LSA-R.S. 15:451; LSA-C.Cr.P. art. 703, subd. C.

4. Criminal Law — 412.1(1)

Defendant, who was adequately advised of his rights, consented to questioning, and acknowledged that he had not been promised anything in return for a statement, and whose allegation that he had been promised a charge of aggravated battery was specifically rebutted by testimony of police officers and by defendant's admission that he made a tape-recorded statement after being charged with first-degree murder, freely and voluntarily made the statement. LSA-Const. Art. 1, § 13; LSA-R.S. 15:451; LSA-C.Cr. P. art. 703, subd. C.

5. Criminal Law — 520(2)

Mere fact that one police officer told defendant that district attorney would be advised of any cooperation was not sufficient inducement to vitiate free and voluntary nature of defendant's confession.

6. Criminal Law — 438(7)

Test of admissibility of allegedly gruesome photographs is whether their probative value outweighed possible prejudice that may result from their display to jury.

7. Criminal Law — 438(1)

Photographs which illustrate any fact or which shed light on an issue or are relevant to describe person, place, or thing involved are generally admissible.

8. Criminal Law — 438(6)

Photographs of deceased victim may be relevant to prove corpus delicti, to corroborate other evidence of manner in which death occurred, to establish location, number, and severity of the wounds, and to establish victim's identity.

9. Criminal Law — 438(6)

Photographs of victim which corroborated testimony describing scene of the crime, severity of the beating, and victim's clothing were distasteful and unpleasant but so gruesome as to inflame jury against defendant in his first-degree murder trial, wherein State did not attempt to use the photographs to prove that defendant was in any way responsible for the burns on victim's body; although photographs showed burns on victim's body, evidence at trial clearly indicated that defendant was not present when fire was set. LSA-R.S. 14:30.

10. Criminal Law — 369.1

Generally evidence of extraneous offenses is inadmissible because of prejudicial effect upon accused's constitutional presumption of innocence; such evidence is excluded to insure that defendant will not be presumed guilty because of past offenses.

11. Criminal Law — 374

If state intends to introduce evidence of other crimes as allowed by statutes which provide that other crimes evidence may be introduced to prove knowledge, intent, and system, notice of such intent must be given to defendant and it must be proved that evidence meets constitutional, statutory, and jurisprudential guidelines for admission. LSA-R.S. 15:445, 15:446.

12. Criminal Law — 374

Where testimony was adduced at motion to suppress evidence that defendant was initially arrested for carrying a concealed weapon, prosecutor should have anticipated detective's statement at trial that defendant had been arrested for that crime; therefore, pretrial notice should have been given of State's intent to introduce the evidence and determination should have been made of its admissibility. LSA-R.S. 14:30, 15:445, 15:446.

13. Criminal Law — 1169.11

In prosecution for first-degree murder, introduction of detective's statement that defendant had been arrested for carrying a concealed weapon, although error, was not prejudicial; knowledge of defendant's arrest for carrying a concealed weapon would not so inflame the jury that it

would unjustifiably convict defendant of second-degree murder. LSA-R.S. 14:30, 15:445, 15:446.

14. Witnesses — 277(1)

When defendant in criminal case takes stand to testify in his own defense, he is subject to all rules applicable to other witnesses and may be cross-examined on whole case. LSA-R.S. 15:462.

15. Criminal Law — 730(3)

In prosecution for first-degree murder, wherein defendant was asked if he had been requested to testify at codefendant's trial and answered affirmatively, but was precluded from answering question as to whether he actually had testified by objection of his attorney, testimony was never before jury which affirmatively showed that defendant did not testify at codefendant's trial; trial judge's admonition to disregard the question was sufficient to assure defendant fair trial, and trial judge did not err in refusing to grant mistrial. LSA-C.Cr.P. art. 770; LSA-R.S. 14:30.

16. Criminal Law — 338(1)

In prosecution for first-degree murder, defendant's mother's testimony that defendant had not been rowdy or violent child and that he had been assistant to a chaplain was relevant and material in that it was offered to show defendant was taught difference between right and wrong. LSA-R.S. 14:30; LSA-C.Cr.P. art. 770.

17. Witnesses — 340(2)

In prosecution for first-degree murder, wherein issue of defendant's religion was raised by defense on cross-examination of defendant's mother who testified that defendant had been assistant to a chaplain, subject of religion was logical one to raise on cross-examination of mother, who answered "Temple B. Zion" in response to question as to which church defendant had attended; no mention was made that "Temple B. Zion" was Jewish congregation or that defendant himself was Jewish and there was no showing that remark would create prejudice in mind of the jury. LSA-C.Cr.P. art. 770; LSA-R.S. 14:30.

Mark H. Kramar, Leesville for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Howat A. Peters, Jr., Dist. Atty. Ad Hoc, for plaintiff-appellee.

WATSON, Justice.*

Defendant, Joel A. Vernon, was charged by grand jury indictment with first degree murder in violation of LSA-R.S. 14:30. He withdrew his initial plea of not guilty and entered pleas of not guilty and not guilty by reason of insanity. Following the trial by jury, he was convicted of the lesser included offense of second degree murder and sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence for forty years. He appealed to this court with twenty-six assignments of error. Six of these assignments were declared abandoned in oral argument. Only eight of the remainder warrant discussion, the others being without merit and involving no novel or unsettled questions of law.

FACTS

Vernon was the owner of the Cave Bar in Leesville, Louisiana. On Halloween night, 1978, he, James Regallis and Timothy Bray were in the back room of the bar with Michael Melcher. Melcher was pressed to repay some debts. A gun was pointed at him, and there was a minor fracas in which Melcher received a small cut on the head.

Vernon, Regallis and Bray then ordered Melcher into Vernon's stationwagon and took him to the Vernon Parish sanitary landfill.

At the landfill, Vernon hit Melcher first, striking him in the stomach with a stick one and a half to two feet long and about an inch in diameter. Melcher's jacket was pulled down to immobilize his arms and the three men took turns kicking and beating him with the stick and a club almost six feet long and two inches in diameter. There

*Honorable Richard H. Gauthier participated in this decision as Associate Justice Ad Hoc.

was testimony that the men played baseball with Melcher: Vernon umpired, Regallis pretended to pitch and Bray swung the club, hitting Melcher. They also engaged in Russian roulette, Regallis and Vernon each firing a shot about a foot above Melcher's head.

Melcher was left lying on his back, rolling his head from side to side and moaning. The other three returned to the Cave Bar.

A short time later, Bray, Regallis and Dale Slama went back to the landfill in Vernon's car. Melcher had pulled off his belt and thrown it aside and had completely unbuttoned his shirt. He felt cold and didn't appear to be breathing. Slama removed Melcher's money and identification from his pockets and, with Bray's help, moved the victim deeper into the woods. Regallis set fire to the area of the beating to conceal blood, and the three men returned to the Cave Bar.

On November 2, 1978, Melcher's charred and beaten body was discovered by hunters at the landfill site.

ASSIGNMENTS OF ERROR NUMBER ONE, NINETEEN, TWENTY, AND TWENTY-ONE

Defendant contends that the trial court should have suppressed his confession. Vernon argues that he gave written statements because he was assured that the most serious offense for which he could be tried was aggravated battery. At trial, Vernon testified that, if he had known he would be charged with murder, he would have requested that a lawyer be present to advise him. (Tr., Vol. VII, p. 848).

This contention is without merit. Vernon was approached by the police for questioning in connection with the Melcher murder as he sat eating in a cafe in Leeville. He was taken into custody for carrying a concealed weapon and was advised of his rights. At the Vernon Parish Sheriff's office, he signed a pre-printed rights form as well as a consent to questioning form, indicating that he fully

understood his rights, that he was willing to answer questions, and that no threats or promises were made. A verbal interview was conducted, and Vernon then gave a five page written statement typed by a police officer containing full *Miranda* warnings and Vernon's signature on each page. He was placed under arrest for murder after giving the written statement. After the arrest, he gave a tape recorded statement which was substantially the same as his earlier written statement.

The police officers present at the time the written statement was given testified that Vernon at no time indicated that he was tired or sleepy or that he wished to discontinue the interview. He was given food, drink and cigarettes and allowed to go to the restroom as he desired. They testified that no promises had been made to induce him to talk but one officer admitted telling Vernon that, if he cooperated, it would be brought to the attention of the district attorney's office. That same officer stated that the subject of aggravated battery came up when Vernon, prior to giving the written statement, asked a police detective if he might be charged with an offense less serious than first degree murder. The detective advised Vernon that the police would charge him with first degree murder although the grand jury could indict him for a lesser offense.

[1-3] High standards of proof for waiver of constitutional rights apply to in-custody interrogation. *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). When a statement is taken without the presence of an attorney, there is a heavy burden on the State to demonstrate that the accused knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *State in the Interest of Dino*, 359 So.2d 586 (La. 1978). Moreover, before a confession or inculpatory statement may be introduced into evidence, the State must prove affirmatively and beyond a reasonable doubt that the statement was free and voluntary and not made under the influence of fear, duress, menaces, threats, inducements, or promises. LSA-Const. 1974, Art. I § 13; LSA-R.S. 15:451; LSA-C.Cr.P. art. 703(C); *State v. LeJeune*, 352 So.2d 619 (La., 1977); *State v. McGraw*,

366 So.2d 1278 (La., 1978).

[4, 5] The State has met its burden. Defendant was adequately advised of his rights and consented to questioning. He acknowledged that he had not been promised anything in return for a statement. The testimony of the police officers specifically rebutted defendant's allegation that he had been promised a charge of aggravated battery. The mere fact that one officer told Vernon that the district attorney would be advised of any cooperation cannot be considered sufficient inducement to vitiate the free and voluntary nature of the confession. Vernon's claim is further eroded by his admission that he made a tape recorded statement after being charged with first degree murder.

These assignments lack merit.

ASSIGNMENT OF ERROR NUMBER SIXTEEN

Defendant contends that the trial judge erred in allowing into evidence photographs of the victim's body at the landfill site.

[6-8] The test of admissibility of allegedly gruesome photographs is whether their probative value outweighs the possible prejudice that may result from their display to the jury. *State v. Matthews* 354 So.2d 552 (La.1978). Photographs which illustrate any fact or which shed light on an issue, or are relevant to describe the person, place or thing involved are generally admissible. *State v. Valentine,* 364 So.2d 595 (La. 1978). Photographs of a deceased victim may be relevant to prove the corpus delicti, to corroborate other evidence of the manner in which the death occurred, to establish the location, number and severity of the wounds and to establish the victim's identity. *State v. Williams,* 343 So.2d 1026 (La.1977); *State v. Myles* (La.S.Ct., 1979, Docket Number 63,567).

[9] The photographs of Melcher corroborate testimony describing the scene of the crime, the severity of the beating, and the victim's clothing. The State did not attempt to use the photographs to prove that Vernon was in any

way responsible for the burns. While the photographs show burns on the victim's body, the evidence at trial clearly indicated that defendant was not present when the fire was set. The photographs are distasteful and unpleasant but not so gruesome as to inflame the jury against defendant. The probative value of the photographs outweighs any prejudicial effect which may have resulted from their display.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER SEVENTEEN

Defendant contends that evidence of his arrest on a charge of carrying a concealed weapon was improperly adduced by the State during the examination of arresting officer, Harold Stork.[1] He assigns as error the trial judge's refusal to declare a mistrial on the ground that the requirements of *State v. Prieur,* 277 So.2d 126 (La.1973) were not satisfied. See LSA-C.Cr.P. art. 770.

[10] Generally evidence of extraneous offenses is inadmissible because of the prejudicial effect upon the accused's constitutional presumption of innocence. *State v. Prieur,* supra; *State v. Morris,* 362 So.2d 1379 (La.1978); Pugh, Louisiana Evidence Law 30 (1974). Such evidence is excluded to ensure that a defendant will not be presumed guilty because of past offenses. See McCormick on Evidence, Section 190 (2d Ed., 1972) Wigmore on Evidence, Sections 55, 57, 194 (3rd Ed., 1940).

[11] LSA-R.S. 15:445, 446, sets out three purposes for which other crimes evidence may be introduced — to prove knowledge, intent and system. If the State intends to introduce evidence of other crimes as allowed by that statute, notice of that intent must be given to defendant

[1]Detective Harold Stork testified on the circumstances surrounding the arrest of Joel Vernon. He stated that he and Detective Jody Dowden approached Vernon and Timothy Bray in a Leesville cafe to question them about the murder. Vernon and Bray consented to the questioning and were advised of their rights. When asked what transpired prior to their departure for the Sheriff's office, Stork stated that a frisk of Vernon revealed a .32 caliber revolver on his person. (Tr., Vol. VI, p. 681).

and it must be proved that the evidence meets the constitutional, statutory, and jurisprudential guidelines for admission. *State v. Prieur,* supra; *State v. Morris,* 362 So. 2d 1379 (La.1978).

[12] Testimony was adduced at the motion to suppress evidence that Vernon was initially arrested for carrying a concealed weapon, so the prosecutor should have anticipated Detective Stork's answer. Detective Stork's statement cannot be excused as unsolicited. See *State v. Foote,* 379 So.2d 1058 (La.1980). Pretrial notice should have been given of the State's intent to introduce the evidence and a determination should have been made of its admissibility.

[13] Nevertheless, introduction of the evidence does not constitute reversible error. In light of the entire record, we cannot say that knowledge of Vernon's arrest for carrying a concealed weapon would so inflame the jury that it would unjustifiably convict the accused of second degree murder. See *State v. Abercrombie,* 375 So.2d 1170 (La.1979).

ASSIGNMENT OF ERROR NUMBER TWENTY-TWO

Defendant contends that the trial court erred in denying his Motion for Mistrial when he was asked if he had testified at the trial of James Regallis. It is argued that since the State may not comment on a defendant's post-arrest silence *(Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) or his failure to testify in his own defense *(State v. Johnson,* 345 So.2d 14 (La.1977), the State is also barred from commenting on his failure to testify at the trial of another.

[14] When a defendant in a criminal case takes the stand to testify in his own defense, he is subject to all the rules applicable to other witnesses and may be cross-examined on the whole case. LSA-R.S. 15:462. *State v.Rhodes,* 337 So.2d 207 (La.1976) stated:

> "[A] defendant who chooses to waive his fifth amendment privilege by testifying may certainly be required

to answer possibly incriminating questions pertinent to the case under consideration, if relevant. He may be cross-examined on the whole case." 337 So.2d 209.

However, the United States Supreme Court has held that a defendant's silence when arrested and advised of his *Miranda* rights may not be used to impeach an explanation subsequently offered at trial. *Doyle v. Ohio,* supra. The court in *Doyle* quoted Mr. Justice White, who concurred in *United States v. Hale,* 442 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975):

"... when a person under arrest is informed as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony." 422 U.S. 182-183, 95 S.Ct. 2139-2140, 45 L.Ed.2d 108.

By analogy, it would seem impermissible to allow defendant's silence at the trial of another to be used against him at his own trial.

[15] However, testimony was never before the jury which affirmatively showed that defendant did not testify at Regallis' trial. Vernon was asked if he had been requested to testify at that trial and answered affirmatively. When asked if he actually had testified, he was precluded from answering by the objection of his attorney. (Tr., Vol. VII, p. 832). The trial judge admonished the jury to disregard the references to his testimony or lack thereof at Regallis' trial and denied defendant's motion for mistrial. In light of these circumstances, we cannot say that the State impermissibly referred to defendant's failure to testify in his own defense so as to warrant a mistrial under LSA-C.Cr.P. art. 770. The trial judge's admonition to the jury to disregard the question was sufficient to assure defendant a fair trial.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER TWENTY-FIVE

This assignment relates to the trial court's refusal to grant a mistrial when reference was made to defendant's religious background. He contends that the prosecutor initiated an irrelevant line of questioning for the sole purpose of informing the jury that Vernon was Jewish.

LSA-C.Cr.P. art. 770 provides that a mistrial is mandated, upon motion of defendant, when a remark or comment by a judge, prosecutor or court official refers to religion, if the remark is not material and relevant and might create prejudice against defendant in the mind of the jury.

Here, the issue of religion was raised by the defense. Defendant's mother testified on direct examination that Vernon had not been a rowdy or violent child and that, while in the service, had been an assistant to a chaplain. On cross-examination, after stating that her son had attended church while growing up, she was asked to specify which church he had attended. She answered "Temple B. Zion" (Tr., Vol. IX, p. 925). No mention was made that Temple B. Zion was a Jewish congregation or that Vernon himself was Jewish.

[16, 17] The testimony in question was relevant and material in that it was offered to show that defendant was taught the difference between right and wrong. Because it had been stated on direct examination that defendant was an assistant to a chaplain, the subject of religion was a logical one to raise on cross-examination. There was no showing that the remark would create prejudice in the mind of the jury and the trial court correctly denied the motion for mistrial.

This assignment lacks merit.

For the reasons assigned, the conviction and sentence are affirmed.

AFFIRMED

DENNIS, J., dissents with reasons.

DENNIS, Justice, dissenting.

I respectfully dissent. The test of admissibility of a so-called "gruesome photograph" is whether its probative value outweighs its probable inflammatory effect. *State v. Gilmore*, 332 So.2d 789 (La.1976). In this case, the prejudice to defendant outweighs the probative value of the photos. The pictures are obviously gruesome. Their probative value is minimal because they do not show with any clarity evidence of beatings inflicted on the victim by Vernon and his cohorts. The body of the victim had been badly burned by a fire set by Vernon's cohorts after he had left the scene and withdrawn from participation in their activities. Since it is clear that Vernon was not involved in the setting of the fire, prejudicial effects of the photos clearly outweighed their probative value.

APPENDIX

UNITED STATES CONSTITUTION, AMENDMENT IV:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA REVISED STATUTE ANNOTATED SECTION 14:30

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

LOUISIANA REVISED STATUTE ANNOTATED SECTION 14:30.I

Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, and armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

LOUISIANA CODE OF CRIMINAL PROCEDURE ANNOTATED ARTICLE 814

A. The only responsive verdicts which may be rendered when the indictment charges the following offenses are:

1. First Degree Murder
   Guilty
   Guilty of second degree murder
   Guilty of manslaughter
   Not guilty

LOUISIANA CODE OF CRIMINAL PROCEDURE ANNOTATED ARTICLE 465

A. The following forms of charging offenses may be used, but any other forms authorized by this title may also be used:

31. First Degree Murder - A.B. committed first degree murder of C.D.

32. Second Degree Murder - A.B. committed second degree murder of C.D.

LOUISIANA REVISED STATUTE ANNOTATED SECTION 14:44

Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent contro:

(1) The forcible seizing and carrying of any person from one place to another; or
(2) The enticing or persuading of any person to go from one place to another; or
(3) The imprisoning or forcible secreting of any person.

CERTIFICATE

I hereby certify that a copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon Louis J. Cosenza, Esquire, attorney for defendant, by placing same in the United States Mail properly addressed with sufficient postage affixed thereto.

Leesville, Louisiana this 1st day of October, 1985.

William E. Tilley

WILLIAM E. TILLEY
DISTRICT ATTORNEY